



November 5, 2010

Joan and Kenneth Senecal
420 Murray Hill Drive
Montpelier Vermont 05602

Re: Jurisdictional Opinion 5-08-1A
Vermont Compost Company/Karl Hammer
City of Montpelier and Town of East Montpelier

Dear Joan and Ken:

This letter constitutes a Jurisdictional Opinion pursuant to 10 V.S.A. 6007(c) and Act 250 Rule 3 and is in response to your inquiries dated October 3 and October 13, 2010, in which you requested a determination as to the date that Act 250 jurisdiction attached to the Vermont Compost Company/Karl Hammer (VCC/Hammer) project and whether legislative amendments enacted, and judicial decisions issued, subsequent to Jurisdictional Opinion 5-08-1 dated January 22, 2008, may support revisions to the conclusions stated in the Jurisdictional Opinion relative to the extent of Act 250 jurisdiction over the VCC/Hammer tract in the City of Montpelier. The applicant filed response positions dated October 11 and November 1, 2010. Jurisdictional Opinion 5-08-1 concluded that the majority of the Montpelier tract was not subject to Act 250 jurisdiction due to statutorily designated "farming" exemptions. As explained below, a review of the legislative amendments and judicial decisions do not support any revisions to the conclusions stated in Jurisdictional Opinion 5-08-1.

FACTS

The facts stated in Jurisdictional Opinion 5-08-1 are hereby incorporated by reference. No new relevant facts were alleged or provided in your submittals.

CONCLUSIONS

As explained in Jurisdictional Opinion 5-08-1, certain improvements and uses on the VCC/Hammer tract are exempt from jurisdiction under Act 250 pursuant to the provisions of 10 V.S.A. 6001(3)(E) and (22)(E). Subsequent to issuance of that Jurisdictional Opinion, legislative amendments were enacted with respect to composting projects and the "farming" exemption. In addition, the Environmental Court and Supreme Court issued decisions addressing the extent of Act 250 jurisdiction over otherwise exempt "farming" improvements and uses which took place on tracts previously subject to the terms of a land use permit.

Date That Act 250 Jurisdiction Attached

The Environmental Board and Supreme Court held that jurisdiction is triggered by the commencement of "construction of improvements" for a commercial purpose and that jurisdiction does not dissolve based on subsequent events. In re Wildcat Construction Co. 160 Vt 631, 632 (1993).

The facts recited in Jurisdictional Opinion 5-08-1 demonstrated that Act 250 jurisdiction attached to the Montpelier site in 1998 when construction of improvements were undertaken for a commercial purpose.

Subsequent to the issuance of Jurisdictional Opinion 5-08-1, the legislature enacted amendments to Act 250 in 2010 specific to composting projects and the “farming” jurisdictional exemption. These amendments are found at 10 V.S.A. 6001(3)(D)(vii)(I-VI), (3)(E), (31)(A-C), and (33).

A review of these amendments indicates that they were intended to further clarify the circumstances under which a composting project may be exempt from jurisdiction under Act 250. None of the legislative amendments support an expansion or extension of jurisdiction over the Montpelier site beyond the portion previously determined to be involved in a “commercial purpose” as explained in Jurisdictional Opinion 5-08-1.

Judicial Decisions

In 2007 the Environmental Court issued its Eustance (13-1-16 Vtec) decision concerning the use of a portion of a previously permitted subdivision tract for an otherwise exempt “farming” use. The Court held that:

While the so-called farming exemption from Act 250 jurisdiction serves an important function in preserving individual farms and Vermont’s strong farming tradition, it is not an unlimited exemption, especially in the context of land that has already received and been sold subject to an Act 250 permit binding successors in interest. Rather, other considerations come into play, including reliance on the terms of an issued Act 250 permit by other parties...

Moreover, the principles of land management embodied in the Act 250 criteria could not be implemented through the permitting program if subsequent exemptions could remove land from the ambit of an issued permit.

Thus, the Environmental Court concluded that, under the express terms of the land use permit, lotowner Eustance was required to seek an amended permit prior to constructing any barns or related infrastructure.

Subsequently, the Environmental Court’s decision was appealed to the Vermont Supreme Court.

The Supreme Court affirmed the Environmental Court holding and ruled that the “farming” improvements and use required an amended land use permit because the terms and conditions of the land use permit for the underlying subdivision were specific enough to support jurisdiction over the otherwise exempt “farming” improvements and uses. [In re Eustance Act 250 Jurisdictional Opinion (#2-231) (#2007-146) (2009)]. The Court discussed at length the distinctions between the statutory provisions for “subdivision” and “development” under Act 250. The Court also placed emphasis on the principle of the “plain meaning” of legislative provisions.

While the Court reaffirmed that jurisdiction over permitted tracts is ongoing, the Court also was clear in its acknowledgment that legislative exemptions from jurisdiction are to be strictly adhered to. Furthermore, the Court analyzed in detail the distinct jurisdictional provisions within Act 250 for “subdivision” and “development” and particularly noted that the legislature had carved out “farming” exemptions specific to “development”.

A reading of the Supreme Court’s Eustance decision does not support revisions to the conclusions stated in Jurisdictional Opinion and a resulting extension of jurisdiction to the “farming” improvements and uses on the VCC/Hammer tract. In summary,

1. The Eustance tract was subject to the specific terms and conditions stated in the land use permit for the subdivision. The District Commission has yet to issue any permit for the VCC/Hammer development.
2. The plain meaning of the statutory exemptions for "farming" are clear and applicable to the improvements and uses on the VCC/Hammer tract not involved in the commercial improvements and uses.

The jurisdictional conclusions stated in Jurisdictional Opinion 5-08-1 remain in effect with respect to the scope of review under the criteria of Act 250 of the commercial improvements and uses on the VCC/Hammer tract in the City of Montpelier - subject to a final decision yet to be issued by the Environmental Court on the still pending appeal of Jurisdictional Opinion 5-08-1.

Sincerely,

/s/ Edward Stanak
Edward Stanak
District Coordinator

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Natural Resources Board Rule 3(A).

Reconsideration requests are governed by Natural Resources Board Rule 3(B) and should be directed to the district coordinator at the above address within 30 days of the issuance of this jurisdictional opinion. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Ctr. Bldg., National Life Drive, Montpelier, Vermont 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

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